IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

CITY OF MENASHA,

Petitioner,

vs.

CLARENCE FURTON, TRUMAN FURTON, LUKE FURTON, FRED FURTON, AND RALPH JOHNSON, CO-PARTNERS DOING BUSINESS AS FURTON BROTHERS CONSTRUCTION COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court Below.

The opinion of the Circuit Court below is reported in 149 F. (2d) 945 and at R. 115-119.

Jurisdiction.

The statement concerning jurisdiction is set forth in the petition and is incorporated herein by reference.

Statement of the Case.

The statement of the case appears in the petition and is incorporated herein by reference.

Specifications of Error.

The Circuit Court of Appeals for the Seventh Circuit erred in the following respects:

1. In holding, in conflict with the decisions of this Court, that Rule 56(c) of the Rules of Civil Procedure requires that on motion for summary judgment by defendant, the Court must accept plaintiffs' fact allegations and statements in their affidavits, and only on the assumption of their verity, yet insufficient, may summary judgment be entered against them, excluding establishment of contrary facts beyond controversy by affidavits submitted by the defendant.

2. In reversing the judgment of the District Court with directions to try all issues without ascertainment, or provision for ascertainment, of material facts which exist without substantial controversy, contrary to the letter and spirit of Rule 56(d) of the Rules of Civil Procedure.

3. In holding (in conflict with the decisions of this Court) that the alleged representations of elevation of underlying rock contained in the plans and specifications, under the facts and circumstances disclosed in the record, might be held to be warranties and the basis for recovery by plaintiffs for breach of warranty.

4. In reversing the summary judgment of the District Court dismissing plaintiffs' complaint.

ARGUMENT.

I.

The Holding of the Lower Court that Rule 56(c) of the Rules of Civil Procedure requires that on Motion for Summary Judgment by Defendant the Defendant must Accept Plaintiffs' Fact Allegations and Statements in their Affidavits and Only on the Assumption of their Verity, Yet Insufficient, may Summary Judgment be Entered against them is in Conflict With the Decisions of this Court.

Rule 56(c) of the Rules of Civil Procedure provides in part:

> "... The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that except as to the amount of damages there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The holding of the lower Court is in conflict with the decision of this Court in the case of

> *Sartor* v. *Arkansas Nat. Gas*, 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967 (cited with approval in *Associated Press* v. *U. S.* —*U.S.*—, 65 S. Ct. 1416, 89 L. Ed. 1512, 1515).

In this case this Court stated the correct interpretation of Rule 56(c) of the Rules of Civil Procedure as being that summary disposition should be on evidence which a jury would not be at liberty to disbelieve, and which would require a directed verdict for the moving party.

The meaning of the Court is clarified by its citation of *American Insurance Co.* v. *Gentile Bros. Co.*, (C.C.A. 5th) 109 F. (2d) 732, 735, in which is cited the case of *Port of*

Palm Beach Dist. v. *Goethals,* (C.C.A. 5th) 104 F. (2d) 706, 709, and by its citation of the case of *Wittaker* v. *Coleman,* (C.C.A. 5th) 115 F. (2d) 305, 306.

Application of the erroneous rule by the lower Court obviously resulted in the Court ignoring the fact that there was no order of defendant's engineer in writing directing performance of the work, a condition precedent to recovery of compensation for the work as extra or additional work pursuant to the contract. The great importance of this single fact in the ultimate result at which the Court arrived will be developed in a subsequent heading into which the subject fits more logically.

Application of this rule by the lower Court probably caused the Court to ignore facts submitted by defendant which supplemented facts presented by plaintiffs but appear to controvert such facts because with the supplementary facts the ultimate fact is contradictory to the fact inferred from the partial presentation. These facts will likewise be developed later.

II.

The lower Court Erred in Reversing the Judgment of the District Court with Directions to Try All Issues Without Ascertainment, or Provision for Ascertainment, of Material Facts Which Exist Without Substantial Controversy, Contrary to the Letter and Spirit of Rule 56(d) of the Rules of Civil Procedure.

Rule 56(d) of the Rules of Civil Procedure provides as follows:

> "Rule 56(d). CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and trial is necessary, the Court at the hearing of the motion, by examining the pleadings and the evidence before it, and by interrogating coun-

sel shall, if practicable, ascertain what material facts exist without substantial controversy, and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy and direct such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly."

The District Court rendered judgment on the whole case dismissing plaintiffs' complaint. Therefore the occasion for it to ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted did not arise.

When the Appellate Court determined to reverse the judgment of the District Court the same situation was created as if the District Court had not rendered judgment on the whole case. Is not the Appellate Court then bound by the rule to ascertain what material facts exist without substantial controversy, and what material facts are actually and in good faith controverted? Or is it then bound to remand the cause to the District Court with directions that afford to the District Court opportunity to make such ascertainment?

That question has not been, but should be settled by this Court.

Remanding the cause as the Lower Court did, with directions to try all issues, was either without regard to the letter and spirit of Rule 56(d) and the beneficial results intended to be accomplished thereby, or it was a determination that not a single material fact exists without substantial controversy, a situation which it will be demonstrated later herein is not present in this case.

III.

The Lower Court Erred in Holding that the Alleged Representations of Elevation of Underlying Rock Contained in the Plans and Specifications, Under the Facts and Circumstances Disclosed in the Record, Might be Held to be Warranties and the Basis for Recovery by Plaintiffs for Breach of Warranty.

MacArthur Bros. Co. v. U. S. 258 U. S. 6, 42 S. Ct. 225, 66 L. Ed. 433.

Where representations in the contract and specifications were alleged that a portion of the work would be done in the "dry" and a portion in the "wet" and to do the work in the "dry" the construction of certain coffer dams was specified and unanticipated conditions were met and performance of the work became more expensive than anticipated, demurrer to the petition was sustained and the ruling affirmed on appeal to this Court.

There was a similar statement to that in the proposal in the case at bar that the proposal was made with a full knowledge of the kind, quantity and quality of the plant, work, and materials required.

The Court commented:

> The Company's "investigation may or may not have been adequate. It, however, took its chances on that. But in reality there was no representation by the government nor is it alleged that the government had knowledge superior to the knowledge of the company. The latter acquired knowledge only by the aid of their divers as work progressed. Such being the situation does not the case present one of misfortune rather than misrepresentation?"

Simpson v. U. S. 172 U. S. 372, 19 S. Ct. 222, 43 L. Ed. 482.

This case involved the construction of a dry-dock and the excavation of the pit or basin for the dock. Borings to a depth of from 39 to 46 feet were made by the Navy Department and the result of these borings was delineated on a profile plan purporting to show the character of the underlying soil, and showed that the soil was stable and contained no quicksand. A copy of this plan was given to the Contractor before it submitted its bid. The location of the dry-dock was to be fixed by the engineer later.

The Court clearly defines the issue as being whether or not the United States by the written contract guaranteed the nature of the soil under the site of the proposed dock and assumed the entire burden which might arise in case it should be ascertained that the soil under the selected site differed to the detriment of the contractor from that delineated upon the plan. The Court failed to find "any statement or agreement, or even intimation that any warranty, express or implied, in favor of the contractor was entered into concerning the character of the underlying soil."

In the *MacArthur* case the Court distinguishes the following three cases where the opposite result was reached and warranties were found. These decisions point out the features or elements essential to the finding of a warranty, which are missing in the case at bar.

Hollerback v. U. S., 233 U. S. 165, 34 S. Ct. 553, 58 L. Ed. 898.

In this case the specifications contained positive representations as to the character of material to be encountered, and contrary thereto the contractor ran into crib work 4.3′ high consisting of sand logs filled with stone, a

structure erected by the same agency for which the contract on which the suit was based was being performed. The court distinguishes the *Simpson* case.

U. S. v. Atlantic Dredging Co., 253 U. S. 1, 40 S. Ct. 423, 64 L. E. 735.

In this case the Court characterized the representations as follows:

> "Representations made by the government were deceptive in that the test borings gave information to the government not imparted to bidders of materials more difficult to excavate than those shown by the maps and specifications."

Christie v. U. S. 237 U. S. 34, 35 S. Ct. 565, 59 L. Ed. 933.

In this case the Court pointed out "the time not being sufficient for the contractors to make their own borings, they relied upon the government borings."

The decision of the lower Court on the facts in the record in the case at bar is in conflict with the decisions of this Court. A review of those facts is contained under the following heading.

IV.

On the Facts Beyond Controversy Presented in the Record the Lower Court Erred in Reversing the Summary Judgment of the District Court Dismissing the Amended Complaint.

We summarize under this heading our comments on the facts, as the most concise and logical method of showing the relation of the facts to the matters to which we have hereinbefore referred. We use as subheads the factual issues enumerated by the lower Court as requiring determination in remanding the cause for trial.

1. Were the bed rock representations in the drawings warranties upon which plaintiffs could and did rely in entering into the contract?

On plaintiffs' own showing the representations were only those contained in the plans and specifications (R. 12), were approximations of the elevation of underlying rock relating particularly to the foundations upon which structures were to be erected and not to the floor of the basin (R. 97) and with no representations as to the method to be employed in performance of the work or conditions to be met in execution of the contract.

On plaintiffs' own showing they were required to inform themselves as to the actual conditions and requirements of the work (R. 17, 21) knew before the contract was executed that no test borings had been made, and that information in reference to the elevation of underlying rock was indefinite, and the defendant had no superior knowledge. (R. 69-70.)

Plaintiffs' complaint is only as to method of performance of the work, that it was more expensive than contemplated, and the difficulties are all related to the existence of a softer material, or the presence of more water than anticipated (R. 12-13) in the construction of a project surrounded on three sides by bodies of water and below the level thereof. (R. 97.)

To these facts plaintiffs added proofs that when the absence of rock at the anticipated elevation where some of the baffle walls were to be erected was discovered, they submitted an estimate of extra work in trenching and lowering of baffle walls of $9107.00 (R. 76), defendant's engineer foretold that the amount of work required would probably be less than estimated (R. 77), final directions in writing were issued by defendant's engineer that trenching for the footings only for the baffle walls should

be performed, in other words the foundations need not be lowered, or more excavation performed than in digging trenches in which the footings under the baffle walls were to be placed (R. 80-81) and that the final allowance for this extra approved by plaintiffs was only $3000.50 (R. 84) or less than one-third the original estimate as foretold by defendant's engineer.

By these facts alone plaintiffs established agreement that the result of the absence of underlying rock at the anticipated elevation required the performance of only extra or additional work in payment of which the plaintiffs accepted the sum of $3000.50. (R. 84.)

To these facts defendant added proof that in their proposal plaintiffs certified, before the contract was executed, that they had informed themselves fully in regard to the conditions to be met in execution of the contract. (R. 95.)

Consideration is necessary of non-completion of the work, non-payment of lien claims, and non-assertion by plaintiffs of any claim for a long time, all admitted by plaintiffs, with details supplied by defendant, but since the lower court treated these as separate factual issues, they are discussed later in this brief.

We submit that by dismissing the original complaint (R. 10-11) with substantially the same showing, the District Court established it as the law of the case that plaintiffs had no cause of action for breach of warranty; but regardless of the correctness of that contention, the finding of the lower court that a cause of action for breach of warranty may exist on the facts presented by this record is in conflict with the law on the subject, well established by the decisions of this court.

2. Was plaintiffs' failure to make the payments necessary for the completion of the contract excused (a) by

defendant's failure to make all payments due the plaintiffs or (b) by the added cost and trouble traceable to the rock bottom representations?

It will be noted that this question recognizes as a premise non-completion of the work and non-payment of lien claims. (R. 14.) Plaintiffs' alleged cause of action, however, rests on the premise that the work was completed and the contract performed, but at an added expense created by the alleged misrepresentation.

Reference to the contract establishes no right in plaintiffs to payment until completion of the work and payment of lien claims. (R. 19.)

So plaintiffs seek to excuse their delinquency by claiming that defendant's failure to pay plaintiffs caused financial stringency of the plaintiffs and made it impossible for plaintiffs to proceed and to pay lien claims. (R. 14.) Financial stringency is an untenable excuse in the face of performance bond with surety. (R. 34.)

The lower court extracts from those allegations the additional excuse (b) that the added cost and trouble traceable to the alleged misrepresentations prevented performance. But that is not the excuse the plaintiffs offer, or what the lower court meant because it describes plaintiffs' default as "failure to make the PAYMENTS necessary for completion of the contract" (R. 119) thereby placing plaintiffs' default and defendant's alleged dereliction on a dollar and cents basis, the non-payment of a specific sum or sums.

What did defendant owe? What could plaintiffs claim it owed?

Not a sufficient amount under the contract. The amount withheld (R. 47) was far less than the amount unpaid on lien claims. (R. 55.)

Not damages for breach of warranty. Such claim must be based on performance of the contract, admittedly not accomplished. Claim of non-payment of the very amount in litigation as a basic element of the right to recover that amount is fallacious reasoning in a circle.

Payment for extra or additional work under the terms of the contract is all that could be asserted. And thus the allegations of paragraph 13 of the amended complaint (R. 14) which we have termed "deceptive and confusing" entered into the consideration of the matter and led the lower court to a confused legal result, as we propose to demonstrate.

A claim for recovery for extra or additional work under the terms of the contract was never asserted by plaintiffs, either in the original complaint (R. 2-5), the amended complaint (R. 11-15), or in the Appellate Court. (R. 130.) The monthly estimates of work performed, approved by plaintiffs, establish lack of such claim throughout the progress of the work. (R. 84-85, 54, 66-67, 68-69.)

Defendant supplied some of the proofs that no claim was asserted until, pursuant to the contract, upon determination of the defendant's engineer and authority vested in him (R. 23-24), the contract was declared in default. (R. 61-65.)

Non-payment by defendant with no request or demand for payment, or even assertion of claim cannot be asserted by plaintiffs as excuse for plaintiffs' default.

Under the terms of the contract (R. 25) such claim could not be asserted in the absence of written order from defendant's engineer, and timely submission of claim, the absence of which were established beyond controversy. (R. 51, 74.)

The excuses urged by plaintiffs are not material factual issues.

3. Lack of written order by the engineer for the additional work and expense, or a waiver by the parties of such written order.

There is no factual issue as to written order as just stated.

Waiver by the parties of such written order is not pleaded, asserted or claimed by plaintiffs. The extent of their assertion is the indirect assertion (Par. 13, R. 14) of "the engineer's direction in writing" and when the existence of this writing was challenged (R. 51), it was not produced.

It was error on the part of the lower court to create out of such circumstances an issue as to waiver of written notice, not raised by the parties themselves. That error demonstrates the fallacy in reasoning into which the lower court fell by concluding that the allegations of paragraph 13 of the amended complaint (R. 14) were an assertion of claim for compensation for performance of extra or additional work pursuant to the contract, not only the assertion of excuse for non-completion of the contract and non-payment of lien claims as that paragraph plainly states. That fallacy is more conspicuous in view of the pronouncement by plaintiffs' counsel to the Appellate Court that plaintiffs were not asserting such claim. (R. 130.)

4. Other factual questions raised by defendant, including controversy as to the completeness of the work and dispute as to time for completion of the work.

There are no other material factual issues raised by defendant. Neither are the two specified by the lower court. Specification of two issues, and exclusion of specification of others, would lead to the conclusion that the lower court itself could point out no others.

Plaintiffs admit non-completion of the work and non-payment of lien claims (R. 14) and that is all that is material on that subject.

There is no substantial dispute as to time for completion of the work. The bare facts were referred to by defendant that the contract provided for completion on or before the 30th day of June, 1942, "time being of the essence of the contract" (R. 18), the contract was declared in default February 2, 1943 (R. 64-65) and on plaintiffs' own showing claim was submitted March 4, 1943 and the work was then only substantially completed and lien claims remained unpaid. (R. 74, 14.) Defendant presented proof that an extension of time for performance was granted. (R. 56.)

The time of performance is material in showing that while it was longer than contemplated, yet no claim for compensation as set forth in the complaint was asserted by plaintiffs during all the time that the work was in progress. That does not make the question of time of performance a material factual issue.

CONCLUSION.

Mindful of the rules of this Court, we have labored diligently to present the questions involved in as concise form as possible. Presentation of the questions are unusually involved with factual matters and the errors charged to the lower court have aggravated that involvement. The task has been difficult, and we hope, capable of accomplishment within the limitations prescribed by this Court.

We have attempted to demonstrate that important questions of federal procedure pertaining to the summary judgment rule are involved and that the alleged errors of the lower court are more than a misinterpretation of well established and important legal principles but amount to a departure from the accepted and usual course of judicial procedure, an assertion which is not extravagant, if this Court will envision what would happen when this case reached trial before the District Court with the directions issued by the Appellate Court. The trial judge would be restricted from exercising his judgment in determining certain material facts in reference to which no additional proofs can be offered because the Appellate court had directed that all facts were in issue and such a trial would be contrary to all orderly judicial procedure.

Respectfully submitted,

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